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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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**IN RE**

**PET FOOD PRODUCTS**

**CIVIL ACTION NUMBER:**

**MDL-07-02867 (NLH)**

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ORDER TO SHOW CAUSE

DATE: APRIL 3, 2009

MITCHELL H. COHEN UNITED STATES COURTHOUSE  
ONE JOHN F. GERRY PLAZA,  
CAMDEN, NEW JERSEY, 08101

**B E F O R E:**

THE HONORABLE NOEL L. HILLMAN UNITED STATES DISTRICT  
COURT, DISTRICT OF NEW JERSEY, AT CAMDEN, NEW JERSEY.

**A P P E A R A N C E S:**

1 WEXLER, TORISEVA, WALLACE,

2 BY: KENNETH A. WEXLER, ESQUIRE,

3 ATTORNEY FOR PLAINTIFFS

4

5 BERGER & MONTAGUE,

6 BY: RUSSELL PAUL, ESQUIRE,

7 ATTORNEY FOR PLAINTIFFS

8

9 NORA CONSTANCE MARINO, ESQUIRE,

10 ATTORNEY FOR PLAINTIFF, LOIS SLEMBECKER

11

12 WILLIAM T. ANASTASIO, ESQUIRE,

13 ATTORNEY FOR PLAINTIFF CYNTHIA DOTOLI

14

15 DLA PIPER,

16 BY: MARY GATELY, ESQUIRE

17 ATTORNEY FOR DEFENDANT MENU FOODS

18

19 FARUKI, IRLEAND & COX,

20 BY: BRIAN D. WRIGHT, ESQUIRE,

21 ATTORNEY FOR DEFENDANT IAMS COMPANY

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SQUIRE, SANDERS, & DEMPSEY,  
BY: MARK G. GOODMAN, ESQUIRE,  
ATTORNEY FOR DEFENDANTS PROCTOR & GAMBLE

HOGAN & HARTSON  
BY: CRISTEN SIKES ROSE, ESQUIRE  
ATTORNEY FOR NESTLE, PETCO, PURINA

STEPHEN J. DANER, CCR, RPR,  
OFFICIAL COURT REPORTER

1 (The following takes place in open Court before the  
2 Honorable Noel L. Hillman, United States District Court,  
3 District of New Jersey, sitting at Camden, New Jersey, on  
4 April 3, 2009)

5 THE COURT: Good morning, everyone.

6 Please be seated.

7 This is Pet Food MDL -- I guess the original  
8 docket, 07-2867, and it's MDL 1850.

9 Appearance, please?

10 MR. WEXLER: Ken Wexler, for plaintiffs in the  
11 class.

12 THE COURT: All right.

13 How are you, Mr. Wexler?

14 MR. WEXLER: Great. Thank you.

15 MR. PAUL: Russell Paul, Berger & Montague on  
16 behalf of --

17 THE COURT: Welcome to you as well, sir.

18 MS. MARINO: Good morning, Your Honor, Nora  
19 Constance Marino, representing plaintiff, Lois Slembecker.

20 THE COURT: They found room at the table for  
21 you.

22 MS. MARINO: I got here first.

23 MR. ANASTASIO: William Anastasio, representing  
24 Cynthia Dotoli.

25 THE COURT: Mr. Anastasio, you found us here in

1 Camden, all the way from Summit.

2 MR. ANASTASIO: Yes.

3 THE COURT: All right.

4 Welcome.

5 MS. GATELY: Good morning, Your Honor.

6 Mary Gately, on behalf of Menu Foods and liaison  
7 counsel for the defendants.

8 THE COURT: Nice to see all of you in person.  
9 After a while you were disembodied voices.

10 Welcome.

11 MR. WRIGHT: Brian Wright, on behalf of the Iams  
12 Company.

13 THE COURT: Welcome.

14 MR. GOODMAN: Mark Goodman for Wal-Mart, Petco,  
15 Pet Smart, Target, liaison counsel for defendants.

16 THE COURT: Welcome to you, Mr. Goodmen, as  
17 well.

18 MR. GOODMAN: Thank you, Your Honor.

19 MS. BERGE: Good morning, Your Honor, Miranda  
20 Berge.

21 MS. ROSE: Cristen Rose, for Menu Foods.

22 THE COURT: Yes, miss Rose. Sometimes we have  
23 trouble hearing you, but we don't have trouble hearing you  
24 because we have this wonderful new sound system here,  
25 although it's highly sensitive. But I guess it's a good

1 thing.

2 It is good to see all of you, although, I have  
3 to say I'm not thrilled with the circumstances.

4 Let's see where we are here.

5 The only issue I'm going to address here, today,  
6 and get an update from Mr. Wexler on the money issue, but  
7 the issue for today is the order to show cause which I  
8 issued, and the matter, Miss Marino 's filing in the  
9 Southern District of New York before, I believe Judge  
10 Rakoff, and Mr. Anastasio, you have a pending matter in  
11 State Court here in New Jersey.

12 MR. ANASTASIO: Yes, Your Honor.

13 THE COURT: Let me -- I have read the papers.  
14 I'm of the view at this stage, in any event, after  
15 reading the papers that both the plaintiffs in the Federal  
16 and State matters appear to be class members. Even  
17 perhaps admitted they're class members, and I'm having a  
18 difficulty understanding why I should not enjoin both you  
19 Miss Marino, and you have Mr. Anastasio, from proceeding  
20 in those respective Courts.

21 But, Miss Marino, you in particular make a great  
22 -- a great deal out of the due process concerns, so it  
23 would be incumbent upon me to hear you. So you tell me  
24 why it's wrong.

25 MS. MARINO: Well, Your Honor, you said you read

1 the papers. I don't want to be repetitive. We simply  
2 didn't know about the action. If, if we knew about it, we  
3 would have either brought the action here or opted out so  
4 we could maintain our separate action. We didn't know.

5 As you can see I did an extensive amount of  
6 research in the time that I had. Rule 23. And, I  
7 understand that it is the law. I believe it's  
8 unconstitutional, and I mean segregation was once legal  
9 and accepted. I don't think it's fair for my client to be  
10 cast aside.

11 As a separate matter I made the cross motion  
12 that my claim form at least be deemed timely filed non pro  
13 tunc, and I asked Miss Rose actually in the beginning of  
14 this when she asked me to discontinue my case, I suggested  
15 if we could sign a stip that they will accept my claim,  
16 but that they were unable to do that. My hands were tied.  
17 I had to keep my action alive in the Southern District. I  
18 understand this Court maintains jurisdiction. I have a  
19 client to protect, and I couldn't look my client in the  
20 eye and tell her you are out of luck, there's nothing  
21 there for you because you didn't affirmatively opt out,  
22 which really flies in the face of logic. You should really  
23 have to affirmatively opt-in. I think people get hurt  
24 with this type thing, and injustice is inevitable, and  
25 I'm sure my client is not the only person who has been

1 cast aside because of the notice, or the lack thereof.

2 And if Your Honor feels that my case should be  
3 enjoined in the Southern District, I respect and  
4 understand the decision, but I would ask my cross motion  
5 be granted.

6 I also don't believe that the defendants have  
7 sufficiently opposed my cross motion. They mention Rule  
8 60. We meet all the requirement of rule 60. No one  
9 disputes my claim of, regarding the lack Constitutionality  
10 or due process.

11 THE COURT: I don't think that's quite true.  
12 They plainly assert, and the law seems to be clear, the  
13 Constitutionality of Rule 23 has been upheld. And, that  
14 the process that was given here is the process that's due  
15 under the circumstances.

16 Miss Marino, the facts are that your client  
17 retained you in August of '07. You had 15 months to  
18 research the existence of this, the matters pending here,  
19 the fact of the recall, which had been months earlier; the  
20 fact of the matters pending here, the preliminary  
21 approval, the final approval. None of that was discovered  
22 by you. If you had discover all that, it seems to me you  
23 would have had the ability to opt out. Rule 11, and I'm  
24 not prejudging whatever motions may be made in the  
25 Southern District of New York, but Rule 11 requires you to



1 engage in an inquiry into the nature of the claim, what  
2 theories exist, what Courts may be proper venues and have  
3 appropriate jurisdiction to hear those claims. If you had  
4 done any of that research prior to November 24th, you  
5 would have been able to preserve the rights of your  
6 client. Your client is out of luck because of inaction  
7 when you had an affirmative obligation during that period  
8 of time to research her claim and file it in an  
9 appropriate Court.

10 I don't have that case before me, and I don't  
11 want to, you know, put you in a box. That issue hasn't  
12 been litigated here. But it doesn't seem to me that you  
13 served your client well. And the suggestion that there  
14 was a lack of due process in this Court, or by these  
15 parties, could be construed as an effort to deflect the  
16 focus away from your own malpractice.

17 MS. MARINO: Your Honor, we researched a lot  
18 about the food and about the poison. I did not research a  
19 class action. But we engaged --

20 THE COURT: If you researched Iams, they were  
21 the subject of the proceedings in this Court. If you  
22 googled Iams, you would have found the existence of this  
23 case. We put it up on the Court website. It was in every  
24 major newspaper. It was on the nightly news. You have to  
25 have had your head in the sand not to know about this

1 case.

2 MS. MARINO: Be that as it may, Your Honor, we  
3 didn't.

4 THE COURT: I have already ruled in this case  
5 that actual notice is not required. That the rule doesn't  
6 require it. The Constitution doesn't require it. The  
7 publications were not random as you described them, but  
8 carefully thought out. They were proposed to this Court,  
9 considered by this Court. They were targeted to both  
10 general circulation papers, to industry newspapers. You  
11 say, yourself, that your client went to a well-renowned  
12 vet, specialized hospitals. This was, there was a  
13 specific targeted notice to the veterinarians of the  
14 world, of the United States. Easily, could have, you  
15 client could have easily received notice that way.

16 You cite cases suggesting that the lack of  
17 mailing or direct notice would be a Constitutional  
18 infirmity. We had mailings to all known claimants in an  
19 effort to reach them as well.

20 Your papers to me present arguments which you  
21 disagree with Supreme Court precedent. This Court is  
22 bound by the Supreme Court. I don't have any authority to  
23 reject a Supreme Court decision because its reasoning is  
24 not consistent, in your view, with its decision. I'm not  
25 sure why the 14th Amendment is thrown up at me unless this

1 involves citation to case law that involves class actions  
2 pending in State Courts. The precise issue was ruled upon  
3 by me in this Court. You were aware at least by December  
4 that this case could implicate your proceedings, and yet  
5 you did nothing to come to me. We had to come to you. We  
6 had to go track you down and bring you here to ask you why  
7 you're continuing to proceed in a Court in which a fair  
8 construction of my order would lead a reasonable attorney  
9 to know that you were acting in actual contempt of my  
10 order. You didn't come here.

11 MS. MARINO: I did contact the Court, Your Honor.

12 THE COURT: You didn't file a motion. You  
13 didn't seek to intervene or to contest the final judgment  
14 or appeal this matter. You continued to litigate in  
15 another forum in what could be fairly construed as actual  
16 contempt of my outstanding order, which you were given --  
17 talk about actual notice, the defendants told you about  
18 it.

19 MS. MARINO: Yes. At that time I said just let's  
20 extend the time to answer and try to figure this out here.

21 THE COURT: You didn't come to me.

22 MS. MARINO: That's true. The defendants made an  
23 order to show cause, and here I am.

24 THE COURT: Here you are.

25 You argue case law that has, talks about

1 settlements that don't have opt out provisions. We had  
2 opt out provisions here. I just -- this is as close to  
3 sanctionable conduct as I have seen in a long time. And I  
4 don't know what else to say about it other than I -- it  
5 seems to me it was not the case with regard to the claims  
6 that one could recover up to 100 percent of your vet bills  
7 and actual damages, as part of that settlement here.

8 MR. WEXLER: That was our goal.

9 THE COURT: And \$900 for those who didn't have  
10 documented damages. You've asserted that there's no  
11 provision in this to address your client's damages, which  
12 is factually inaccurate.

13 MS. MARINO: I apologize. There's not a lot of  
14 time to prepare my papers. I did the best that I could.

15 THE COURT: You had 15 months, Miss Marino, 15  
16 months between the -- the affidavit of your client that  
17 says she retained you in August of '07. You had 15 months  
18 to figure out what claims she had and where they could be  
19 asserted. And, you waited until literally the day that  
20 the claims period expired, after extensive hearings in  
21 this Court, carefully calculated notice and broad  
22 publicity.

23 I think if your client's pet died as a result of  
24 the food manufactured by Iams or Menu Foods, then she  
25 perhaps was a victim. But I think she was victimized

1 twice by your failure to adequately address the legal  
2 remedies available to her, and I don't think it's fair for  
3 you to attribute to these parties or to this Court a lack  
4 of due process.

5 So, unless you have something else to add, I'm  
6 inclined to enjoin you from proceeding in the Southern  
7 District of New York. At this point I'm not going to  
8 direct you to dismiss the case. It seems to me that it  
9 would, I want to be respectful of Judge Rakoff and his  
10 docket. But if you continue to prosecute that case, you  
11 will be in my mind in contempt of this Court and this  
12 Court's orders.

13 I leave it to you what you need to do to be in  
14 compliance.

15 MS. MARINO: I understand that, and the cross  
16 motion, Your Honor?

17 THE COURT: Well, let me ask Mr. Wexler if I  
18 could what the status of the various claims are, here. Do  
19 the likely claim exceeds the fund?

20 MR. WEXLER: They do. We have 25,000 claims and  
21 we're in the middle of the adjusting process. We get  
22 periodic reports from Heffler, the administrator. All the  
23 claims have not been vetted, yet. We don't know what the  
24 end number will be. There are, they're just in that  
25 process.

1           Now typically what will happen at the end of the  
2 process, Heffler will make a recommendation to us and give  
3 us the reasons why they are rejecting certain claims or  
4 accepting claims; this one was late; this one was not;  
5 whatever their recommendation is, and we will confirm on  
6 ourselves and come to the Court with a proposed  
7 distribution order and recommendation, and ask for Your  
8 Honor's blessing of the distribution.

9           It's really premature to be able to judge, even  
10 whether this claim would have an impact because until the  
11 vetting process is finished, we really don't know the  
12 aggregate number that is going to be requested to be paid  
13 out to people and how that, whether there is a serious pro  
14 rata distribution or whether it's 100 percent or not. We  
15 can't tell, yet.

16           THE COURT: Does the claim administrator have  
17 the capacity to keep a record of claims filed out of time?

18           MR. WEXLER: Yes. And we asked them to do that  
19 because it's not unusual for claims to have come in late.  
20 It's just not in a class action, whether securities case,  
21 consumer case, antitrust or anything else. And, sometimes  
22 the administrator rejects it out of hand for that reason.  
23 Sometimes they make a recommendation it be rejected out of  
24 hand or that it, you know, so long as -- the key in my  
25 experience is whether or not consideration of the claim

1 will affect the overall administration process. This  
2 case, considering where we are in the process, I would  
3 say, no, it would not. But whether or not it would be  
4 accepted is another matter.

5 THE COURT: All right.

6 My thought was that there were -- there were  
7 provisions to pay over the remainder to charitable  
8 organizations. One could argue that it would be more  
9 fair, if there were in fact extra funds available, that  
10 perhaps they would be best applied to actual out of time  
11 claims. But that's why I asked.

12 MR. WEXLER: I think it's a great idea, but I  
13 think what we're looking at, realistically, based on the  
14 number of claims which I think the last time we were here  
15 we were, it was 13,000. When the doors closed it became,  
16 it was 25,000. They have to be, you know, there are  
17 standards that the administrator has to apply to make sure  
18 that these are all legitimate claims, and it appears now  
19 that there will be no remainder for charities. But we  
20 don't know.

21 THE COURT: Well -- I'm sorry, Miss Gately.

22 MS. GATELY: May I say something for a moment?

23 THE COURT: Sure.

24 MS. GATELY: I would just note in our papers we  
25 sort of set forth our position on the late filing of the

1 claims which was, we said under the circumstances, this  
2 isn't the right case for the Court the exercise its  
3 discretion in that way.

4 I would note for the Court that next week we  
5 have a reply brief due in the Southern District of New  
6 York and as recently as last week we had a brief filed by  
7 Miss Marino requesting the Southern District to proceed  
8 ahead full steam.

9 Under these circumstances, I wanted to note that  
10 for the Court, because we are continuing to have to expend  
11 money to, you know, fight on two fronts, and I think if we  
12 turn back to the point in time when she embarked on this  
13 filing her claim, on November 24th in the Southern  
14 District of New York instead of coming here, what we told  
15 her at that time was dismiss your case in the Southern  
16 District of New York, make your application here to this  
17 Court, and that wasn't done. Under these circumstances, I  
18 would present that I have an objection to the Court having  
19 the late claim, but we are continuing to expend extensive  
20 resources which is not fair to the defendants at this  
21 stage of the case.

22 MR. WEXLER: With respect to that --

23 THE COURT: I'm sorry. I don't want to lose the  
24 thought that I'm hoping it will end.

25 MS. GATELY: Me, too, Your Honor.



1 MS. MARINO: Your Honor, I do not believe a reply  
2 brief will be necessary. I will discontinue the case in  
3 the Southern District.

4 MR. WEXLER: With respect to the continuation of  
5 expenditures of costs, which I certainly sympathize with  
6 under these circumstances, you know, the late claim and  
7 how it's considered has no impact on the defendants at  
8 all.

9 THE COURT: They have a --

10 MR. WEXLER: They will pay. It's a liquidated  
11 amount. It's, you know, we have to consider together the  
12 impact of late claims on other payments to the class and  
13 whether permitted or not. At this juncture it's been  
14 submitted to the administrator who has it. So, it's a  
15 question of whether it just gets considered with  
16 everything else, but the lateness is noted. We are aware  
17 of this, the peculiarities attached to this claim, and at  
18 the appropriate time we will be able to address it with a  
19 recommendation. But it's just premature.

20 THE COURT: So there exists at least the  
21 possibility that if one determined that the pro rata  
22 impact on all of the other claimants was, is minimal, that  
23 some recovery to this or other late claimants might be at  
24 the end of the day some possible amendment of the overall  
25 settlement, and in the interest of fairness.

1           MR. WEXLER: Yes. I don't know it requires an  
2 amendment, but, yes, we understand, and this is one of the  
3 issue with notice. Notice is not perfect. Sometimes  
4 people are a little late. Maybe a good reason. Maybe  
5 there isn't. And, it has to be taken into account as  
6 well. But, and maybe under these circumstances it's not a  
7 good reason. But it's just like I said, it's premature.  
8 It may be appropriate. We will test the impact of the  
9 late claims on pro rata distributions or full  
10 distributions and be able to make a judgement at that  
11 point.

12           I could just tell you the volume, though, and  
13 how its been constructed that you can imagine,  
14 particularly in the undocumented phase where the  
15 administrator has to read the explanations. Some are  
16 very, very long. Pull out the numbers. It's a, it's a  
17 longer process than we all would like, but it's, that's  
18 what is taking place now, and it's premature to make a  
19 judgment of the effect of late claims on distributions.

20           THE COURT: All right. I feel comfortable  
21 exercising jurisdiction and enjoining further proceedings  
22 that, by class members in violation of my previous order.  
23 I would be, I would at least need briefing on the issue of  
24 any possible amendment of the final plain or final orders  
25 here because we do have a pending appeal, do we not?

1           MR. WEXLER: We do. I would not make a -- this  
2 would come up, we will bring a motion to distribute the  
3 funds at which time we will address this issue with Your  
4 Honor. That's what we do as class counsel. Being here  
5 today and hearing your concerns and the arguments and  
6 talking to defense counsel, we're, you know, we deal with  
7 late claims on a regular basis. Sometimes we ask for them  
8 to be permitted and sometimes we ask for them not to be.  
9 We'll give an explanation and brief the issue.

10           THE COURT: Perhaps one of the reasons why the  
11 final order recognized the continuing jurisdiction of this  
12 Court.

13           MR. WEXLER: That's right.

14           THE COURT: To see that settlement terms are  
15 ultimately put in place; that the relief negotiated is  
16 implemented; and to the extent this Court would exercise  
17 such powers, the continuing equitable power of the Court  
18 should insure a just result under the circumstance.

19           MR. WEXLER: That's right.

20           THE COURT: Mr. Anastasio hasn't been heard  
21 from, yes, but has his client put in a claim, Mr. Wexler,  
22 to your knowledge?

23           MR. WEXLER: We don't know.

24           MR. ANASTASIO: No, Your Honor. Although we  
25 would like the opportunity to do so. My client was among

1 that group that had two dogs that died as a result of the  
2 food. My client psychologically spun out of control and  
3 her entire life melted down with every characteristic you  
4 could imagine associated with that, what I'm describing.

5 She did come to me with this matter. I was  
6 unaware of the claim. Perhaps I'm in the same group as  
7 Miss Constance Marino, with regard to the not making  
8 adequate preparation.

9 THE COURT: I'm not asking you to fall on your  
10 sword, Mr. Anastasio. Your papers were --

11 MR. ANASTASIO: My client is among that group  
12 also that the, this litigation and settlement was  
13 specifically designed to assist. She is among that group.  
14 She has medical bills. She has costs of purchase of her  
15 dogs -- all of the information needed in order to  
16 demonstrate that she in fact is among the group who this  
17 entire litigation was designed to benefit, and to resolve  
18 the issue that was the very issue that is in her case.

19 Failure by either counsel or through information  
20 distribution, in not knowing that there were time limits  
21 in the filings, and in the end, the result is that the  
22 person who has been victimized is now victimized again.

23 I understand there needs to be on the part of  
24 Menu Foods and the other defendants that an answer to the  
25 solution to this to move on and an end to it as with all

1 Court proceedings. Reviewing the Judge's order, reviewing  
2 the fillings, and all of that, clearly there's ample legal  
3 basis to overcome the objections raised by counsel.  
4 However, in that the Menu Foods and other plaintiffs  
5 really in no way would be harmed by my client being  
6 included in on that class, and being that it would be an  
7 additional devastation for my client after having lost the  
8 two dog, having lost her family, and all of the other  
9 things that occurred as a result of some of these actions,  
10 that in the interest of true justice to the individual, I  
11 think that it would be appropriate to include her in that  
12 class of people who could at lease benefit, to the limited  
13 extent that the settlement consent order allows.

14 THE COURT: Well, are you familiar, Mr.  
15 Anastasio, with the Chancellor's foot?

16 MR. ANASTASIO: No, Your Honor.

17 THE COURT: The -- first of all I think Mr.  
18 Wexler has recognized, and suggested to me that the  
19 proceedings pending before me have some room for equitable  
20 considerations at the end of the line. There are limits  
21 to equity. There's value to the law. You have rules and  
22 they're followed. Then there is, and there is adequate  
23 notice then there is a fairness to the uniform application  
24 of a known rule. But if I exercised my equity and let a  
25 couple people in the door after the door is closed, it

1 raises another equitable issue, and that is the equitable  
2 issue associated with all those other people out there who  
3 also didn't get it in time and also suffered a loss, and  
4 also suffered harm. This is an imperfect system. But,  
5 why should I cut the recovery for those who followed the  
6 rule of law, followed the orders of the Court, and made  
7 timely claims in order to benefit your clients when there  
8 were other people similar situated who will recover  
9 nothing. The notion of the Chancellor's foot is equity is  
10 in the, is in the power of the Court, but every Court that  
11 exercises it would, and sees it differently. You might as  
12 well measure the Chancellor's foot to determine the extent  
13 of the equity that would be granted. That has its own  
14 inequities, its own unfairness.

15 So I'm going to leave it to another day, and Mr.  
16 Wexler's advocacy and good judgment as this thing moves  
17 forward to see how the claims play out. Nothing that I  
18 would do today here should be construed as any prejudice  
19 to Miss Marino's application to the claims administrator  
20 or to any that you might file, or indeed any that might  
21 come in late. But you will have to recognize that you're  
22 late. The issue of the adequacy of this, the notice and  
23 adequacy of this settlement will be decided, it seems to  
24 me, by the Court of Appeals, and if it's affirmed, then  
25 this issue will be joined. But in the interim you have

1 all the other remedies available to you at law, and my  
2 suggestion is that you get in line and see how it plays  
3 out.

4 MS. MARINO: For the record, we will withdraw our  
5 State action.

6 THE COURT: All right. That would be consistent  
7 with the orders previously ordered, entered by this Court.

8 MR. ANASTASIO: Yes, Your Honor.

9 THE COURT: And any further prosecution of those  
10 actions will be considered by this Court as a potential  
11 act of contempt.

12 MR. ANASTASIO: I understand.

13 THE COURT: Anything further, Miss Gately?

14 I see in your footnote that you are willing,  
15 despite the positions you have taken, and I take no issue  
16 with them, it seems to me you are gracious in your  
17 footnote with regard to attorney fees, that you will give  
18 Miss Marino and Mr. Anastasio another chance to do the  
19 right thing.

20 MS. GATELY: That's right, Your Honor.

21 THE COURT: Without prejudice.

22 MS. GATELY: Without prejudice to a future  
23 application if they continue their cases.

24 The only remaining matter, I could give an  
25 update relating to the status of the Canadian order when

1       you are ready.

2               THE COURT:   The Canadian order --

3               MS. GATELY:   Of the Provinces.

4               THE COURT:   Let's wrap this one up.

5               Miss Gately, I'll ask you to submit an order, a  
6       final order enjoining the plaintiffs in the pending matter  
7       in the Southern District, and the matter in the New Jersey  
8       State Court from proceeding further in those, prosecuting  
9       those claims in these Courts. I'll ask you to draft it in  
10      a way that makes -- I don't quite feel comfortable  
11      ordering them to dismiss them. I'm not sure there's much  
12      of a distinction there, but I certainly feel comfortable  
13      enjoining them from proceeding further.

14              MS. GATELY:   I'm clear on how to do that.

15              THE COURT:   All right.

16              I'm going to deny, to the extent that the  
17      requested relief includes attorney's fees, I'm going to  
18      deny that without prejudice. I'm going to deny the cross  
19      motion to allow for the claims to be recognized as a  
20      timely claim, to be filed timely, non pro tunc. And, I'll  
21      deny the, that the sum certain be allowed for that claim.

22              Nothing in that ruling, as I indicated, will  
23      preclude the claims administrator from acknowledging,  
24      recording, and in essence placing on the shelf any out of  
25      time claims, including any filed in the future by Mr.



1 Anastasio's client, and the one that has been claimed, and  
2 perhaps further supplemented by submissions made by Miss  
3 Marino.

4 Whether those are recognized by this Court at  
5 the end of the day requires more proceedings, more  
6 history, and a report by the claims administrator when we  
7 come to the final distribution. I will take up any legal  
8 and equitable arguments regarding those claims when that  
9 issue is properly joined.

10 Anything further, Miss Marino?

11 MS. MARINO: No, Your Honor.

12 THE COURT: Mr. Anastasio?

13 MR. ANASTASIO: No, Your Honor.

14 THE COURT: Anything further, Miss Gately?

15 MS. GATELY: No, Your Honor.

16 THE COURT: Mr. Wexler, anything further on that  
17 issue?

18 MR. WEXLER: No. You covered it.

19 Thank you.

20 THE COURT: All right.

21 Miss Gately, how many Provinces are there in  
22 Canada?

23 MS. GATELY: We have 7 of 9. We're getting there  
24 slowly, ever so slowly. Alberta and New Brunswick are  
25 still holding out. Alberta, as I mentioned in one of the

1 prior telephonic status hearings, had raised an issue with  
2 respect to the currency issue, that the Canadian  
3 plaintiffs had raised, and there has been a back and forth  
4 from the plaintiff's lawyers in Canada responding to the  
5 Court's inquiry, and I think we expect that that has been  
6 resolved, and that there's nothing that's stopping the  
7 Court from issuing the order, but not -- New Brunswick is  
8 just taking its time.

9 THE COURT: An island unto itself. Or connected  
10 to the mainland, but in any event, it's encouraging we  
11 have 7 of 9. A little bit frustrating we don't have the  
12 other 2. It's clear to me you have been working  
13 diligently on it, consistently, and that it's once again  
14 just a matter of time. Is that a fair assessment?

15 MS. GATELY: Yes, Your Honor. My Canadian  
16 counsel again predicts a week, 10 days, hopefully, and  
17 they expect to get the other orders. They can't guarantee  
18 that, but that's what they expect.

19 THE COURT: All right.

20 Mr. Wexler, is that your understanding?

21 MR. WEXLER: We are hostage to the Canadians  
22 right now. It is my understanding.

23 THE COURT: All right.

24 And nothing else that you can do that you  
25 haven't already done in anticipation of those orders.

1 There's a place, once the orders are in place and no  
2 longer in violation of the Canadian orders that the  
3 mechanism is in place?

4 MR. WEXLER: We have an escrow set up as Wells  
5 Fargo. It's ready to receive funds as soon as the matter  
6 is funded, which is after New Brunswick and Alberta weigh  
7 in.

8 THE COURT: Miss Gately on behalf of the  
9 defendants and various contributors to the fund, there  
10 continues to be no reason to believe that the money is not  
11 still available and ready to be contributed to the fund at  
12 the appropriate time.

13 MS. GATELY: We can't wait to get the funds in  
14 there. We've been ready, willing, and able to get it in  
15 for quite some time.

16 THE COURT: As Mr. Anastasio and Miss Marino's  
17 presence make clear, there's a lot of people in line and  
18 waiting.

19 So, I can continue to appreciate the efforts of  
20 everyone to work through the difficult issue to deal with  
21 the multi-jurisdictional wrinkles. There's nothing more  
22 I can do except thank you for your updates, and thank you,  
23 and await the final word.

24 I suppose we should set it down for a telephone  
25 conference. Miss Neuvoa is right on the spot here. April

1 20th, 2009, at 1:00 o'clock, if we could have our standard  
2 telephone conference? It's another 17 days, which even by  
3 Canadian time should be all right.

4 MS. MARINO: It does not include myself and Mr.  
5 Anastasio, correct?

6 THE COURT: Subject to our jurisdiction, as a  
7 result of the finally settlement order, and order to show  
8 cause, but we have liaison counsel on the plaintiff's side  
9 and on the defense side. You have not formally intervened  
10 in these proceedings, so although as a member of the class  
11 you are entitled to all the rights attendant to that  
12 status, and I ask you to confer with Mr. Wexler about the  
13 status of the case so that you are aware of the nature of  
14 the proceedings here, but this is conference for liaison  
15 counsel only.

16 MS. MARINO: Thank you.

17 THE COURT: All right.

18 Anything further for today?

19 I know I have some pending motions that I'll  
20 take up shortly. I may have you back here on one of them,  
21 but -- they're t'd up. One, I believe is an issue with  
22 regard to the destruction of the inventory which was not  
23 fully briefed.

24 MR. WEXLER: We are filing a brief, today.

25 THE COURT: All right. I'll take that up and

1 the other issue concerning the appeal in short order.

2 Please expect something soon or otherwise you'll  
3 hear from the Court concerning the scheduling of a  
4 hearing.

5

6 MR. WEXLER: Yes, sir.

7 MS. GATELY: Thank you, Your Honor.

8 THE COURT: Thank you all for being here.

9 Mr. Anastasio and Miss Marino, I expect you'll  
10 be getting in line. Unfortunately it's the end of the  
11 line, but you will be in line, and I'll sign the order  
12 that I have asked for promptly when it's submitted.

13 The record will reflect the denial of the  
14 motions. If the order could also specify the ruling with  
15 regard to the motions I would appreciate it.

16 MS. GATELY: Yes, Your Honor.

17 THE COURT: Nice to see you all again.

18 Good luck, and see you again, soon.

19 (At which time the matter was adjourned)

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C E R T I F I C A T E .

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5 I, Stephen J. Daner, C.C.R., Official United States Court  
6 Reporter and Certified Court Reporter of the State of New  
7 Jersey, do hereby certify that the foregoing is a true and  
8 accurate transcript of the testimony as taken  
9 stenographically by and before me at the time, place and  
10 on the date hereinbefore set forth.

11 I do further certify that I am neither a relative nor  
12 employee nor attorney nor counsel of any of the parties to  
13 this action, and that I am neither a relative nor employee  
14 of such attorney or counsel and that I am not financially  
15 interested in this action.  
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21 S/STEPHEN J. DANER  
22 STEPHEN J. DANER, C.C.R.  
23 Certificate No. 30X100151400  
24 Date: April 4, 2009  
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